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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CROCKER NATIONAL BANK, a national banking association,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION, an Agency of the State of California, an Agent of the Cities, Cities and Counties, and Counties of California, an Agent of the San Francisco Bay Area Rapid Transit District and an Agent of the Southern California Rapid Transit District, et al.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether Section 5219 of the Revised Statutes (12 U.S.C. § 548) bars the imposition of California state and local sales taxes on sales of tangible personal property to national banks for periods prior to January 1, 1973.*

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*In addition to the parties named in the caption, the United States is also a party to this action.

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STATE BOARD OF EQUALIZATION, an Agency of the State of California, an Agent of the Cities, Cities and Counties, and Counties of California, an Agent of the San Francisco Bay Area Rapid Transit District and an Agent of the Southern California Rapid Transit District, et al.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

The petitioner, Crocker National Bank ("Crocker"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 23, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix A, *infra*, A-2—17. The Memorandum of Opinion of the United States District Court for the Northern District of California (App. B, *infra*, A-18—40) is reported at 450 F. Supp. 1030.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 23, 1980 (App. C, *infra,* A-41). A rehearing was not requested. In an order dated January 7, 1981, Justice Rehnquist extended the time to file a petition for a writ of certiorari to and including February 27, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The federal statute involved is Section 5219 of the Revised Statutes (12 U.S.C. § 548) as amended by Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 (1969) (App. D, *infra,* A-42—45), and Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 755 (1971) (App. E, *infra,* A-46). The California statutes involved are Revenue and Taxation Code §§ 23181(a) and 23182 (App. F, *infra,* A-47).

The provision of the United States Constitution involved is Article VI, Clause 2 (App. G, *infra,* A-48). The provision of the California Constitution involved is Article 13, Section 16 (renumbered Section 27 in 1974) (App. H, *infra,* A-49).

STATEMENT

A. Statutory Provisions.

As the decision below observed (App. A, *infra,* A-2—8), state taxation of national banks has been the subject of a series of decisions of this Court and federal legislation. In 1819, this Court held unconstitutional a state tax on the Bank of the United States on the ground that it amounted

to "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." *M'Culloch v. State of Maryland,* 17 U.S. (4 Wheat.) 316, 436-37 (1819). Subsequent to *M'Culloch,* a long line of decisions by this Court established that the states are without power, unless authorized by Congress, to tax national banks. *See, e.g., Owensboro National Bank v. Owensboro,* 173 U.S. 664, 668 (1899); *Des Moines National Bank v. Fairweather,* 263 U.S. 103, 106 (1923); *First National Bank v. City of Hartford,* 273 U.S. 548, 550 (1927); *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239, 244 (1931).

In response to these decisions, Congress enacted a series of statutes which in the aggregate allowed state taxation of national banks in any one of four specified ways in addition to taxes on their real estate.[1] *See* Section 41 of the Act of June 3, 1864, ch. 106, 13 Stat. 111; Act of February 10, 1868, ch. 7, 15 Stat. 34; Act of March 4, 1923, ch. 267, 42 Stat. 1499; Act of March 25, 1926, ch. 88, 44 Stat. 223, as incorporated in Revised Statutes Section 5219 (12 U.S.C. § 548). This Court characterized the 1864 legislation as marking "the outer limit within which States can tax national banks" (392 U.S. at 345). It therefore held that a state sales tax, which by its terms must be passed on to the purchaser, was invalid as applied to national banks

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[1]The four specified ways were: (1) taxation of the shares of the bank; (2) the inclusion of bank dividends in the taxable income of a shareholder; (3) the taxation of banks on their net income; or (4) the imposition of a tax according to or measured by the bank's net income. See *First Agricultural Nat'l Bank v. State Tax Comm'n,* 392 U.S. 339, 341-342 n.3 (1968).

because such taxes were not among the four specified methods of taxation permitted by Congress in 12 U.S.C. § 548. *First Agricultural National Bank v. State Tax Commission,* 392 U.S. 339 (1968).

After this Court's decision in *Agricultural Bank,* Congress concluded that there was "no longer any justification for * * * continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. No. 91-530, 91st Cong., 1st Sess. 2 (1969). Accordingly, Congress enacted both "permanent" and "temporary" amendments to Section 5219 of the Revised Statutes. *See* Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434. The "permanent" amendment provides that for purposes of state as well as federal taxation, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located" (Pub. L. No. 91-156, *supra,* at Section 2). However, the effective date of the "permanent" amendment was deferred until January 1, 1973 in order to permit the states to conform their tax statutes to the new provisions. *See* S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969); Act of December 22, 1971, Pub. L. No. 92-213, Section 4(a), 85 Stat. 775.

The "temporary" amendment governs taxation of national banks during the transition period between the date of the Act (December 24, 1969) and the effective date of the "permanent" amendment (January 1, 1973). Under the "temporary" amendment, the states could tax national banks on the same basis as state banks except that they could not impose a tax on intangible personal property

and were limited in the manner in which they could tax national banks having a principal place of business in another state. Pub. L. No. 91-156, *supra,* at Section 1.

The "temporary" amendment was subject to a "saving provision" precluding, during the transition period, the imposition on national banks of new taxes (*i.e.,* taxes not authorized under Section 5219 as it read before the enactment of Pub. L. No. 91-156) unless the imposition of such taxes was "authorized by *affirmative action* of the State legislature after the enactment of this Act" (emphasis supplied). Pub. L. No. 91-156, *supra,* at Section 3(a). However, such affirmative action was not necessary for sales or use taxes, taxes on the execution or recordation of documents, or taxes on tangible personal property, where such taxes were "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, *supra,* at Section 3(b)(3).

In 1938, the California Supreme Court ruled in *Western Lithograph Co. v. State Board of Equalization,* 11 Cal.2d 156, 78 P.2d 731 (1938), that the legal incidence of the California sales tax was upon the retailer for purposes of federal immunity under Revised Statutes Section 5219. (The holding in *Western Lithograph*[2] is occasionally referred to as the "state incidence test.") Pursuant to *Western Lithograph,* California imposed its state and local sales tax on sales to banks for periods prior to December 24, 1969, as

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[2]Although petitioner argued in the court below that *Western Lithograph* incorrectly decided the incidence of the California sales tax as a matter of state law, petitioner is not raising that question in this petition.

well as for the period in issue, December 24, 1969, through December 31, 1972 (App. A, *infra*, A-16).

In *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976), this Court determined that under Revised Statutes Section 5219 the legal incidence of the California sales tax fell upon the national banks in their purchases of tangible personal property. Accordingly, the banks as consumers were exempt from the California sales tax under Section 5219, prior to its amendment by Pub. L. No. 91-156. In accordance with that decision, the State Board of Equalization ("Board") has made refunds to the national banks for sales taxes paid on their purchases of tangible personal property for periods not barred by the applicable statute of limitations prior to December 24, 1969 (App. A, *infra*, A-8). However, the Board has refused to make refunds for purchases made from December 24, 1969, through December 31, 1972 (App. A, *infra*, A-8) based on the proposition that the amendment to Revised Statutes Section 5219 made by Pub. L. No. 91-156 permits California to impose automatically its sales tax on Crocker and other national banks for the period in question (App. A, *infra*, A-8).

B. The Facts in This Case.

Petitioner Crocker is a national banking association chartered under the laws of the United States with its principal office and place of business in San Francisco, California. The Board does not dispute that sales taxes (or "sales tax reimbursement" as the Board prefers to describe it) were paid by Crocker, with the amount subject to final audit by the Board. Complaint for Declaratory Judgment and for

Refund of Taxes Illegally Collected (C.T. 7) and Answer (C.T. 22-23). Crocker has requested that certified copies of the record be sent to the Court.

This action was brought by the United States and petitioner Crocker for a declaratory judgment that state sales taxes were not legally imposed under Revised Statutes Section 5219, as amended by Pub. L. No. 91-156, on national banks by California during the period December 24, 1969, through December 31, 1972, and, in the case of Crocker, for a refund of sales taxes collected by the Board for that period (C.T. 1-10). The action was brought in the United States District Court for the Northern District of California pursuant to 28 U.S.C. §§ 1331, 1345 and 2201.[3]

The case was submitted to the District Court on cross-motions for summary judgment on the pleadings (App. B, *infra*, A-19). The District Court entered its Memorandum of Opinion on May 4, 1978, holding that California was permitted automatically to impose its sales tax on sales to national banks during the period in issue pursuant to Subsection 3(b) of Pub. L. No. 91-156 (App. B, *infra*, A-18—37). The District Court filed its Order and Judgment in favor of the Board on May 22, 1978 (App. B, *infra*, A-38—40).

On October 23, 1980, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Court held that although the burden of the California

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[3]As a federal instrumentality, Crocker was a proper party to the action. *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966); *United States v. State Tax Commissioner*, 481 F.2d 963, 974-75 (1st Cir. 1973); *United States v. Arlington County*, 326 F.2d 929, 932-33 (4th Cir. 1964).

sales tax was upon the banks as consumers, Subsection 3(b) did not prohibit automatic imposition of the sales tax upon the banks because the legislature did not intend the franchise tax to be in lieu of the sales tax. California imposed a built-up rate franchise tax which was "in lieu of all other taxes" except real property taxes. Cal. Rev. & Tax. Code § 23182. In spite of the language of the franchise tax, the Court concluded that the legislature did not intend the tax to be in lieu of the sales tax because both taxes were imposed upon the banks before and after Pub. L. No. 91-156 was enacted. The Court rejected petitioner's argument that the California legislature did not believe the franchise tax to be in lieu of the sales tax because under *Western Lithograph* the legislature understood that the incidence of the sales tax was upon the vendor and not the consumer bank.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Incorrect.

The decision below is contrary to this Court's decision in *Diamond National* which determined that the incidence of the California sales tax is upon the consumer national bank and the Court's decision in *Chase Manhattan Bank v. Finance Administration*, 440 U.S. 447 (1979), which held that Revised Statutes Section 5219 as amended by Pub. L. No. 91-156 must be strictly construed to carry out the limitations upon state taxation contained in the statute and that the characterization of state taxes enumerated in the statute must be determined by the federal courts independently of state court determinations. If, as we submit, Revised Statutes Section 5219, is construed in accordance with the requirements of *Diamond National* and *Chase Manhattan*, the decision below is incorrect.

If the decision in this case is permitted to stand, the national banks in California will have substantially overpaid their sales taxes for the period at issue in the amount of approximately $14 million including interest. In our view, the patent misconstruction of the federal statute by the Court of Appeals in upholding the substantial assessments is a sufficient reason for review by this Court despite the limited effect of the decision below. Furthermore, in *Chase Manhattan* this Court recently granted summary relief in regard to a similar misconstruction of the same statute involving the imposition of New York City taxes upon national banks doing business in that city.

Given the narrow scope of the issue and the opportunity of the parties for a full discussion of the pertinent authorities at the petition stage, the Court may deem it appropriate to grant certiorari and summarily reverse. A similar course was followed in *Chase Manhattan* and in other cases when the Court has concluded that full briefing and argument are unnecessary. *See, e.g., Diamond National Corp. v. State Board of Equalization, supra; United States v. America Friends Service Committee,* 419 U.S. 7 (1974); *United States v. Pomponio,* 429 U.S. 10 (1976). We submit that this procedure is entirely appropriate here as well.

The Court of Appeals held that the California sales tax was not legally imposed prior to December 24, 1969, so that it was a "new" tax for purposes of Pub. L. No. 91-156 and that no affirmative state legislation was enacted during the bridge period.[4] Therefore, the court acknowledged

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[4]After the enactment of Pub. L. No. 91-156 the California banks asked the California Legislature to take affirmative action by repealing the built-up rate franchise tax and taxing banks as other corporations. See A.C.A. 56 (Murphy, 1970); S.C.A. 53 (Zenovich, 1971);

(App. A, *infra,* A-8) that Subsection 3(a) of Pub. L. No. 91-156 bars imposition of the California sales tax unless permitted by Subsection 3(b).

Subsection 3(b)(1) permits a state to automatically impose a sales tax upon national banks as consumers provided that the state does not impose a tax, or built-up rate of tax, in lieu thereof. Therefore, the issue is whether California imposes a tax on banks which is in lieu of its sales tax.

First, it is important to note that the sales tax referred to in Subsection 3(b)(1) is a sales tax imposed upon the banks as consumers. Both courts below acknowledged this fact. Indeed this must be the case because Congress was permitting the states to impose a sales tax upon national banks; if the sales tax was in fact imposed upon the vendor it could have been imposed in any event.

Second, this Court in *Diamond National* determined that the California sales tax by its terms is imposed upon the consumer. Thus the California sales tax is the type of sales tax described in Subsection 3(b)(1).

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and S.C.A. 51 (Zenovich, 1972). Each of these Constitutional amendments was accompanied by legislative proposals. None of these measures was reported out of committee. In 1979 Cal. Rev. & Tax. Code § 23182 was amended by the legislature to provide specifically that the franchise tax was not in lieu of sales and use taxes as well as several other state and local taxes. 1979 Cal. Stats. c. 1150 § 14. The legislature also stated that "In view of pending litigation concerning the application of sales tax to banks, it is not intended by the enactment of this Act that any inference be drawn from it in such litigation." 1979 Cal. Stats. c. 1150 § 22. However, the point is that the legislature finally amended the franchise tax law in 1979 and settled the problem of the application of the sales tax to banks.

Third, California imposes a built-up rate franchise tax on national and state banks which is "in lieu of all other taxes and licenses, state, county, and municipal, upon the said banks except taxes upon their real property." Cal. Rev. & Tax. Code § 23182 (West). Under the plain language of Section 23182 the franchise tax is in lieu of a sales tax imposed upon the banks as consumers.

Petitioner submits that the conclusion is inescapable that the California franchise tax is in lieu of its sales tax and therefore the sales tax is barred from automatic imposition under Subsection 3(b).

The Court of Appeals did not dispute the above analysis except in one respect. The Court held that in spite of the clear language of the franchise tax law the California Legislature did not intend the franchise tax to be in lieu of the sales tax. The Court found support for its position from the fact that "during the bridge period sales tax on sales to banks was imposed *in addition* to the built-up rate of franchise tax." (App. A, *infra,* A-15).

The fact that California both imposed the franchise tax upon the banks and collected the sales tax from them does not sustain the Court of Appeals' position. It is clear that the state thought it could collect the sales tax from the banks because the California Supreme Court in *Western Lithograph* held the sales tax was imposed upon the vendor and not upon the consumer bank. Under that holding the franchise tax was not in lieu of the sales tax because the sales tax was not imposed upon the banks. But the holding in *Western Lithograph* cannot validly be applied here; this Court in *Diamond National* rejected the reasoning in

Western Lithograph in construing the California sales tax. Since the reasoning in *Western Lithograph* has already been rejected by this Court in *Diamond National* in regard to Revised Statutes Section 5219, there is no reason why it should be applied to the statute as amended.

A. The California Cases Make Clear that the Franchise Tax is in lieu of a Sales Tax Imposed Upon National Banks.

The intent of the California legislature in regard to the in lieu provision in the franchise tax law has been spelled out by the California courts. The franchise tax is in lieu of all other taxes imposed upon the banks except real property taxes.

In accordance with Revised Statutes Section 5219, the California legislature adopted a built-up rate franchise tax in which an attempt was made to equalize the tax burden as between banks and non-banks. The rate was based upon personal property taxes non-banks paid even though it was known that many non-banks would have a much greater investment in personal property than banks. There was no attempt by the legislature to base the additional tax upon taxes banks did not have to pay.[5]

As required by Revised Statutes Section 5219, Cal. Rev. & Tax. Code § 23182 provides that the franchise tax imposed "upon banks is in lieu of all other taxes . . . except taxes upon their real property." The California courts have

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[5]The banks maintained that the built-up rate was inequitable. See Appendix I for an excerpt from a California legislative report commenting upon the inequity.

always made clear that under this statute and the similar provision in the California Constitution the banks are indeed exempt from the imposition of all other taxes upon them. *Security-First National Bank v. Franchise Tax Board*, 55 Cal. 2d 407, 412-14, 11 Cal. Rptr. 289 (1961); *Thomas v. Department of Motor Vehicles*, 59 Cal. App. 3d 731, 735, 131 Cal. Rptr. 164 (1976). The *Thomas* case is instructive on this point because it also deals with Subsection 3(b), Pub. L. No. 91-156. In *Thomas,* the franchise tax on banks was held to be in lieu of the California motor vehicle tax even though the motor vehicle tax was not taken into account in calculating the rate of franchise tax. The court based its decision on the plain language of Cal. Rev. & Tax. Code § 23182 and the incidence of the motor vehicle tax. Since the incidence of the motor vehicle tax was on the banks the Court held that the motor vehicle tax could not be automatically imposed under Subsection 3(b) because the franchise tax was in lieu of the motor vehicle tax. This is a clear holding that if the incidence of the tax is upon the banks, it is barred by the franchise tax, and, therefore, barred by Subsection 3(b).

B. The Decision Below Conflicts with This Court's Decisions in Chase Manhattan and Diamond National.

As stated above the Court of Appeals found that the California Legislature did not intend the California franchise tax to be in lieu of the sales tax. If the California Legislature did intend to impose both the franchise tax on banks and the sales tax on banks as consumers, its intent must have been based on the belief that the sales tax could be legally collected. The franchise tax by its terms pro-

hibited the imposition of a sales tax where the incidence was upon the banks. Thus, the sales tax could have been legally collected only if its incidence was on the vendor as determined under the *Western Lithograph* case. Reliance on the incidence test developed in *Western Lithograph* to determine whether the California sales tax may automatically be imposed upon national banks is erroneous because it not only rejects this Court's determination in regard to the incidence of the sales tax in *Diamond National,* but also the rationale which this Court set forth in *Chase Manhattan* for interpreting Pub. L. No. 91-156.

In *Chase Manhattan,* the issue presented was whether the New York City commercial rent tax could be imposed on national banks during the bridge period provided by Pub. L. No. 91-156. The New York Court of Appeals upheld imposition of the tax on two grounds. First, the Court of Appeals found that the affirmative legislation requirement of Subsection 3(a)(2) was satisfied by an amendment which constituted a reenactment of the commercial rent tax under state law. The amendment increased the rate of tax but did not specifically extend the tax to national banks.

A second, "equally dispositive" ground for the court's conclusion was that the New York City commercial rent tax was a tax on tangible personal property for purposes of Subsection 3(b)(3) so that it could be automatically imposed.[6] The basis for such holding was that the com-

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[6]During the period in question, New York imposed a franchise tax on the net income of national banks. N.Y. Tax Law § 219 rr.1 (McKinney). The tax was not explicitly designated as "in lieu" of other taxes and neither the New York Court of Appeals nor this Court discussed the application of the proviso clause of Subsection 3(b).

mercial rent tax had consistently been held to be a tax on tangible personal property under New York law.

In a *per curiam* opinion, this Court granted the petition for certiorari and summarily reversed the judgment of the New York Court of Appeals. The Court rejected the lower court's holding that the affirmative legislation requirement of Subsection 3(a)(2) had been met. Although double taxation would not result from imposition of the tax, the Court found that the legislative history of Pub. L. No. 91-156 required the state legislature to consciously consider the impact of a new tax on the existing balance of taxation between national and state banks.

This Court also held that the state court's characterization of the tax as a tax on tangible personal property for state law purposes was not controlling for purposes of Subsection 3(b)(3). The Court stated:

> Whether the tax at issue is a tax on tangible personal property within the meaning of Pub. L. 91-156 is a question of federal law; and for the purposes of that statute, it appears to us that Congress did not consider real estate occupancy taxes to be taxes on tangible personal property.

440 U.S. at 449. The proper characterization of the tax for federal purposes was found by the Court from the language of Section 1 of Pub. L. No. 91-156 which indicated that Congress did not consider real estate occupancy taxes to be taxes on tangible personal property. Thus, *Chase Manhattan* holds that in interpreting Section 3 state taxes must be construed independently of state court determinations and that even in the absence of double taxation the require-

ments of Section 3 must be met before any new tax may be imposed by a state during the bridge period.

Chase Manhattan is simply the most recent in a long line of cases holding that federal courts must independently determine the nature and incidence of state taxes in construing a federal statute which limits the states in imposing taxes upon federal instrumentalities. *First Agricultural National Bank v. State Tax Commission,* 392 U.S. 339 (1968); *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 121 (1954); *Colorado National Bank v. Bedford,* 310 U.S. 41 (1940); *Society for Savings v. Bowers,* 349 U.S. 143 (1955).

Thus, under the rationale of *Chase Manhattan* the sales tax in the present case must be characterized in accordance with *Diamond National* which established that the incidence of the tax is upon the consumer banks. The in lieu language of Cal. Rev. & Tax. Code § 23182 bars the imposition of any tax (other than a real property tax) if its incidence is upon the banks. See discussion of *Thomas v. Department of Motor Vehicles* at 13, *supra.* Therefore, the built-up rate franchise tax by its terms is in lieu of the sales tax.

C. The Court of Appeals' Interpretation Removes the Proviso Clause of Subsection 3(b) as a Federal Limitation Contrary to the Requirements of Chase Manhattan.

As stated above the Court of Appeals determined that the California franchise tax is not in lieu of the sales tax and therefore the proviso clause of Subsection 3(b) relating to in lieu taxes does not prohibit the imposition of the sales tax on national banks. Petitioner contends that the court had to follow the California Supreme Court's opinion

in *Western Lithograph* to arrive at its conclusion. By so doing, however, the Court of Appeals has in effect removed the proviso clause from the statute.

This conclusion can be illustrated as follows. The question whether the franchise tax is in lieu of sales tax obviously depends upon whether or not the incidence of the sales tax is upon the banks. If we eliminate from Subsection 3(b) the words "imposed by a state which does not impose a tax, or an increased rate of tax, in lieu thereof," the question whether the franchise tax is in lieu of the sales tax would then be a matter of determining the nature of the sales tax in accordance with California court decisions. On the other hand, if we follow the Court of Appeals' reasoning, if the proviso clause is retained the question whether the franchise tax is imposed in lieu of the sales tax is again determined under California court decisions as they relate to the incidence of the sales tax.

The Court of Appeals' interpretation is clearly wrong since it construes congressional action in adding the proviso clause to be a meaningless act. It violates the obvious intent of Congress to provide a federal limitation upon imposition of the taxes enumerated in Subsection 3(b) during the bridge period.

In *Chase Manhattan* the Court looked to the statutory language of Subsection 1(a) of Pub. L. No. 91-156 to determine whether the tax at issue was a tax on tangible personal property for purposes of Subsection 3(b)(3). Similarly, the Congressional intent regarding federal and state limitations upon state taxation of banks during the bridge period may be determined by contrasting Section 3 of Pub. L. No. 91-156 with Subsection 2(a). The latter sub-

section, which contains the permanent amendment of Revised Statutes Section 5219 effective January 1, 1973, reads as follows:

> For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Under this provision the only federal limitation is that national banks must be treated the same as state banks. The statute says nothing about in lieu taxes, or previously prohibited taxes, or any limitations intended to equalize burdens between banks and other corporations. These problems are to be left to state law, and therefore the statute is silent as to them.

On the other hand, during the bridge period Section 3 specifically retains limitations upon imposition of previously prohibited taxes, including the proviso clause which prohibits their automatic imposition if the state imposes a tax in lieu thereof. To be meaningful each of these limitations upon state action must be construed as a federal limitation. This would mean determining the incidence of the California sales tax in accordance with this Court's decision in *Diamond National.*

The fact that Subsection 3(b) and the proviso clause were intended as federal limitations is evident from the legislative history of Pub. L. No. 91-156. The history clearly indicates that the sentiment in Congress and among those testifying was that federal limitations on state taxation of national banks should be changed. The principal question

was what limitations should be retained. A basic issue was whether federal law should continue to protect banks from simultaneous imposition of both previously prohibited state taxes and previously permitted in lieu taxes, or whether the problems of simultaneous imposition should be resolved by state law.

The legislative history demonstrates that Congress made a deliberate choice between retaining and relinquishing federal limitations on state action. The bills and proposals before Congress were drafted in those terms; the testimony and statements presented to the Senate Committee on Banking and Currency and the floor discussion in the Senate center on this issue. *See generally Hearing on S. 2065, S. 2906 and H.R. 7491 Before the Senate Committee on Banking and Currency*, 91st Cong., 1st Sess. (1969), hereinafter *"Hearing"*; and Senate sessions reported in 115 Cong. Rec. 35398-404 (1969) and 115 Cong. Rec. 38633-634 (1969). *See also* H.R. 7491, passed by the House (similar to Subsection 2(a), Pub. L. No. 91-156, *supra*, p. 18); S. 2906, introduced by Senator Holland; the proposal of the Treasury Department which was concurred in by the Comptroller of the Currency; and the American Bankers Association proposal. (The measures appear in *Hearing* at 12, 14, 32, 68.) S. 2906 would have retained the limitations of Revised Statutes Section 5219 but permitted immediate imposition of certain new taxes, including sales and use taxes. The other proposals followed a similar pattern.

Although the American Bankers Association proposal was similar to S. 2906, it contained a further federal limitation on imposition of new taxes, that is, they could not be imposed "by a State which imposes any tax, or imposes an

increased rate of tax, in lieu of such other tax." *Hearing* at 68. It is important to note that Subsection 3(b) closely follows the suggestions of the A.B.A. because the testimony on behalf of the A.B.A. proposal shows that the additional limitation was a federal limitation and that it was proposed to preserve equality between banks and other corporations. *Hearing* at 38-40, 41, 42-44, 59-60, 66-68. The A.B.A. stated:

> In a number of States, California for example, an increased rate of tax over and above the tax rate applicable to corporations generally is imposed on banks in lieu of sales, personal property, and motor vehicle taxes. It would obviously be unfair and improper to impose these special taxes under the new authority, and at the same time to continue the extra tax or the built-up rate of tax. *Hearing* at 59.

In the final analysis Congress struck a compromise between those advocating that H.R. 7491, passed by the House, go into effect immediately and those who advocated a more restrictive policy. Federal limitations, as spelled out in Sections 1 and 3 of Pub. L. No. 91-156, were retained until January 1, 1973. To construe the proviso clause of Subsection 3(b) in accordance with the sales tax incidence test determined in *Western Lithograph,* as did the Court of Appeals, would mean that state limitations were put into effect immediately rather than after the bridge period.

CONCLUSION

For the reasons stated we submit that the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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(Appendices follow)

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2899
DC No. CV 77-0786

UNITED STATES OF AMERICA; and CROCKER NATIONAL BANK, a national banking association,

Plaintiffs-Appellants,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California, an agent of the Cities, Cities and Counties, and Counties of California, an agent of the San Francisco Bay Area Rapid Transit District, and an agent of the Southern California Rapid Transit District,

Defendant-Appellee.

[Filed Oct. 23, 1980]

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles B. Renfrew, District Judge, Presiding
Argued July 11, 1980; Submitted August 4, 1980

Before: TRASK and CHOY, Circuit Judges, and SMITH,* District Judge.

*The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

CHOY, Circuit Judge:

The United States and Crocker National Bank (Crocker) appeal from the district court's order granting summary judgment in favor of the State Board of Equalization (Board). The district court ruled that the 1969 temporary amendment to § 5219 of the Revised Statutes of the United States permitted the Board to impose its state and local sales taxes on sales of tangible personal property to national banks between December 24, 1969, and December 31, 1972. We affirm.

I. *BACKGROUND*

Over 160 years ago, in the historic case of *McCulloch v. Maryland*, 17 U.S. 315, 4 Wheat. 316 (1819), the Supreme Court declared national banks constitutionally immune from state taxation. Since 1864, however, Congress has waived that immunity by statute and permitted certain forms of state taxation. *See* Act of June 3, 1864, c. 106, § 41, 13 Stat. 99, 111-12. Although the Supreme Court more recently has declined to decide whether, under present-day conditions, national banks should still be considered non-taxable as federal instrumentalities, the Court nonetheless has affirmed the rule that states may tax national banks only as specifically permitted by Congress. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 341-46 (1968).

A. *Taxation of National Banks in California*

Prior to December 24, 1969, Congress had allowed state taxation of national banks in any one of four specified ways

in addition to taxes on their real property. Rev. Stat. § 5219 (current version at 12 U.S.C. § 548.)[1] In 1928, California chose the fourth method, a franchise tax based on net income. Cal. Const. art. XIII, § 16 (current version at Cal. Const. art. XIII, § 27). This franchise tax, applicable both to state banks and national banks, was "in lieu of all other taxes, and licenses, state, county and municipal, upon the said banks except taxes upon their real property." Cal. Rev. & Tax Code § 23182.

In 1938, the California Supreme Court held that the incidence of the state sales tax, enacted in 1933, was on the retailer and not the purchaser and that therefore sales tax could be imposed on sales of tangible personal property *to* national banks. *Western Lithographic Co. v. State Board of Equalization*, 11 Cal. 2d 156, 78 P.2d 731, 737 (1938). Concomitantly, sales tax could not be imposed on sales of tangible personal property *by* banks because such a tax would be on the banks as retailers and not of a type

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[1]This section provided in pertinent part:

> The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income . . . .
>
> 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others . . . .
>
> . . . .
>
> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

allowed by § 5219. The Court based this decision on its analysis of the intent of the California legislature in enacting the sales tax. 78 P.2d at 734-35.

Because non-bank corporations in California paid personal property taxes in addition to a franchise tax on their income, California attempted to equalize the respective tax burdens of banks and non-banks by applying a built-up rate of the franchise tax to banks. This built-up rate was based on the ratio between the average amount of personal property taxes paid by non-banks and their average net income.

B. *The 1969 Amendment to § 5219*

In 1968, the Supreme Court in *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 346-48 (1968), held that the incidence of a newly-enacted Massachusetts sales tax was on the purchaser, for federal purposes, and thus the tax could not be imposed on sales of tangible personal property to national banks. The following year, the Court struck down sales and other taxes imposed on national banks by the state of Florida. *Dickinson v. First National Bank*, 393 U.S. 409 (1969). These decisions created great difficulties for states in their attempts to equalize the tax burdens of banks and other businesses and led to the enactment of Pub. L. No. 91-156, 83 Stat. 434 (1969), which amended § 5219.

In its report accompanying that bill, the Senate Banking and Currency Committee observed:

> There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that

> national banks are peculiarly an instrumentality of the Federal Government, and, as such, hold a unique and distinct position from that of other institutions. Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks.

S. Rep. No. 91-530, 91st Cong., 1st Sess. 2, *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1595.

Therefore, Congress, in Pub. L. No. 91-156, completely revised § 5219 to permit states to tax national banks as state banks, effective January 1, 1972 (later amended to January 1, 1973).[2]

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[2]Pub. L. No. 91-156 provides in part:

§ 1. Temporary amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the juris-

During the bridge period, from December 24, 1969 through December 31, 1972, the temporary amendment provisions of Pub. L. No. 91-156, §§ 1 & 3, applied. Subsection 1(a) required nondiscrimination between banks and nonbanks and between state banks and national banks. Subsection 1(b) provided limitations on state taxation of national

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diction of such State, if such taxes are imposed generally throughout such jurisdiction on a nondiscriminatory basis:

. . . .

(b) The amendment made by subsection (a) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.

§ 2. Permanent amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended to read:

"Sec. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

(b) The amendment made by subsection (a) becomes effective on January 1, 1972 [later amended to January 1, 1973].

§ 3. Saving provision

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

banks not having their principal offices in the state. Subsection 3(a) provided that no tax could be imposed on a national bank unless (1) it was already imposed before December 24, 1969, or (2) the state legislature, by affirmative action, enacted the tax after December 23, 1969. Subsection 3(b) provided that, notwithstanding the requirements of § 3(a), certain specified taxes, including sales tax, could automatically be imposed without affirmative legislative action if the state did not already "impose a tax, or an increased rate of tax, in lieu thereof."

The California legislature did not take any affirmative action. But because the sales tax was not considered to be on the purchaser the Board continued during the bridge period to impose the sales tax on sales of tangible personal property *to* national banks, but not on sales *by* national banks.

C. *Diamond National*

In 1976, the Supreme Court expressly overruled the California court's construction of the state sales tax law. *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976). The Supreme Court held that, for purposes of federal law, the incidence of California's sales tax was

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(1) any sales tax or use tax complementary thereto,

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

. . . .

on the purchaser and thus could not legally have been imposed on sales of tangible personal property to national banks before December 24, 1969. *Id.* at 268.

Accordingly, the Board refunded sales taxes collected from sales of tangible personal property to national banks before December 24, 1969. With regard to the bridge period, however, the Board maintained that § 3(b) of Pub. L. No. 91-156 allowed the automatic imposition of California's sales tax as one "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Therefore, the Board refused to refund sales taxes for that period. This suit followed.

II. *DISCUSSION*

The parties agree that California's sales tax could not be imposed on sales of tangible personal property to national banks before December 24, 1969. *Diamond National* is dispositive of this point. Thus, subsection 3(a)(1) of Pub. L. No. 91-156 is inapplicable. It is also agreed that the California legislature took no affirmative action to authorize such a tax after December 24, 1969. Thus, § 3(a)(2) is also inapplicable. Therefore, the sole issue in this case is whether California's sales tax on sales of tangible personal property to national banks was a tax "imposed by a State which does not impose a tax or an increased rate of tax, in lieu thereof" within the meaning of § 3(b).

The Board contends, and the district court ruled, that (1) Congress intended in § 3(b) that state tax laws be considered to determine whether a tax, or an increased rate of tax, was actually imposed in lieu of the specific tax sought to be imposed automatically under § 3(b); and (2) the built-up rate of California's bank franchise tax was not

actually imposed in lieu of the sales tax on sales of tangible personal property to national banks. We agree with both conclusions.

A. *Consideration of State Law in Applying § 3(b)*

Crocker contends that it was error to consider state law in applying § 3(b). A federal test alone must be used when applying a federal statute regarding state taxation of national banks, argues Crocker, citing *First Agricultural National Bank,* 392 U.S. at 347, and *Chase Manhattan Bank v. Finance Administration,* 440 U.S. 447 (1979). Using this approach, Crocker generates the following syllogism:

California's bank franchise tax was in lieu of all other taxes (except real property taxes) on national banks. According to *Diamond National,* a sales tax on sales to national banks is a tax on national banks. Therefore, the franchise tax was imposed in lieu of the sales tax and the sales tax is not permitted by § 3(b).

The cases cited by Crocker, however, do not support the broad proposition advanced by Crocker and they do not preclude consideration of state law in the application of § 3(b). The issue in *First Agricultural* was whether the Massachusetts sales tax on sales to national banks was a tax on the banks for purposes of § 5219. 392 U.S. at 346-47. *Diamond National* involved the same issue with regard to California's sales tax. 425 U.S. at 268. Here, it is conceded that California's sales tax is a tax on the banks; the only question is whether the franchise tax was "in lieu thereof." Thus, we are not faced with a choice between federal and state incidence tests, as Crocker suggests. There is no incidence issue involved here.

In *Chase Manhattan Bank,* there were two issues involving Pub. L. No. 91-156. The first was whether the New York legislature had authorized the imposition of the state commercial rent and occupancy tax by "affirmative action" as required by § 3(a)(2). 440 U.S. at 448. That subsection is not at issue in this case; as already mentioned, all parties agree that the California legislature took no affirmative action.

The second issue in *Chase Manhattan* was whether New York's commercial rent and occupancy tax was a "tax on tangible personal property" within the meaning of § 3(b)(3). The New York Court of Appeals had held that it was. But the Supreme Court held this to be a question of federal law and concluded from a facial analysis of Pub. L. No. 91-156 that Congress did not consider real estate occupancy taxes to be taxes on tangible personal property. *Id.* at 449. Here, however, it has already been established by *Diamond National* that, for federal purposes, California's tax on sales to national banks is indeed a sales tax on national banks. 425 U.S. at 268. Thus, the California sales tax is within § 3(b)(1). The *Chase Manhattan* Court did not reach the question we now face in this case, *i.e.*, what Congress meant in § 3(b) by "in lieu thereof."

The teachings of *First Agricultural* and *Chase Manhattan*—that a federal test must be used to determine the incidence and type of a state tax for federal purposes—do not preclude consideration of state law to determine if California's bank franchise tax was imposed in lieu of the sales tax on sales to national banks. An analysis of both the

language and the legislative history of Pub. L. No. 91-156 in general, and § 3(b) in particular, indicates that Congress did intend that state tax law be considered.

1. *Facial analysis of § 3(b)*

As with any exercise of statutory construction, our starting point is the face of the statute itself. Subsection 3(b)(1)-(3) lists three types of taxes, including sales tax, which may be imposed automatically—*i.e.*, without affirmative legislative action—by any state that does not already impose another tax, or an increased rate of tax, "in lieu thereof."

We think the most natural reading of the language of § 3(b) is the one given to it by the district court—"in lieu thereof" means "actually in lieu of those specific taxes listed in § 3(b)(1)-(3)." Under this interpretation, an analysis of California's taxing structure is necessary to determine whether the built-up rate of the bank franchise tax was in fact imposed in lieu of the sales tax on sales to national banks.

Crocker interprets § 3(b) to permit the automatic imposition of a sales tax only where a state does not impose any form of "in lieu" tax, whether or not that tax is actually in lieu of the sales tax. But each of the four types of taxes permitted by § 5219 before 1969 were required to be in lieu of the others, § 5219(1)(a); and states could impose no tax other than one of those four types (except real property taxes), *First Agricultural*, 392 U.S. at 343. Thus, Crocker would have us read § 3(b) to mean that the three taxes listed in § 3(b)(1)-(3) could be imposed automatically only by a state that had no tax whatsoever (other than real

property taxes) on national banks.[3] We agree with the district court that this strained interpretation deprives much of the language of § 3(b) of any significance. If Congress had intended this meaning, it need not have included the words "in lieu thereof" in § 3(b). Nor would any reference to "an increased rate of tax" be necessary if § 3(b) could apply only where no tax at all was imposed. In order for its theory to prevail, Crocker must point to a clear indication in the legislative history of § 3(b) that Congress intended this unusual construction.

2. *Legislative history*

The legislative history, however, belies Crocker's approach and confirms the district court's interpretation of

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[3]Crocker insists that its argument is not so broad. Crocker suggests that § 3(b) would still be available in a state that had a § 5219 tax if that tax were "narrowly worded." For instance, Arizona's § 5219 tax, codified at Ariz. Rev. Stat. Ann. § 42-901, was also a tax based on the net income of national banks. But unlike California's bank franchise tax, which was "in lieu of all other taxes" on national banks, the Arizona tax was, by its terms, "in lieu of any tax on the shares of stock or net income" of national banks. Ariz. Rev. Stat. Ann. § 42-902. Because a sales tax is not a tax on "the shares of stock or net income" of national banks, Crocker argues that the Arizona § 5219 tax would not be "in lieu of" a sales tax. Thus, § 3(b) would still be applicable in a state with a § 5219 tax like Arizona's. This analysis, however, ignores the basic structure of § 5219. The imposition of any of the four types of taxes permitted by § 5219 was required by that statute to be in lieu of the other three types. § 5219(1)(a). The language of the Arizona statute simply reflects that requirement. Furthermore, § 5219 was intended to prescribe the *only* ways in which states could tax national banks; no other tax may be imposed. *First Agricultural*, 392 U.S. at 343. Thus, no matter how "narrowly worded" a state's § 5219 tax might be, for federal purposes, any § 5219 tax must be construed to be "in lieu of all others." *See id.* at 346-47.

§ 3(b). The general purpose of Pub. L. No. 91-156 was to promote equality in state taxation of state banks vis-a-vis national banks, and banks vis-a-vis non-bank corporations. S. Rep. No. 91-530, 91st Cong., 1st Sess. 2, *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1594-95. Hence, its objective was to allow each state "the greatest possible degree of autonomy with regard to the formulation of its tax structure." *Id.* at 1595. But because some states had already adopted built-up rates and other formulas in attempts to equalize tax burdens, the danger of unintended double taxation was seen in an immediate lifting of all restrictions:

> If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the state legislature, by conscious effort, attempted to achieve.

Id. at 1599. Therefore, the affirmative action requirement of § 3(a)(2) was included. *Id.*

In order to avoid needless expense to the states this restriction was further refined in § 3(b) to permit automatic imposition of certain specified forms of taxes, including sales taxes, where other taxes or built-up rates were not already imposed "in lieu thereof." These specified taxes were referred to as "newer" forms of taxes because, although common in 1969, they were for the most part unknown in 1926 when § 5219 was last amended. Thus, automatic imposition of these newer taxes would not present any danger of double taxation in the usual case. *See id.* at 1600 (Individual views of Mr. Tower). Consistent with the

purpose of avoiding double taxation, the references to § 3(b) reflect an understanding that those newer taxes that were not already actually compensated for in another tax or built-up rate would be exempted from the affirmative action requirement. *See* Hearings on S. 2065, S. 2096, and H.R. 7491 before the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. 41 (recommending automatic imposition except where taxes "in lieu of personal property and sales taxes" were already imposed); *id.* at 43 (American Bankers Association proposal permitting automatic taxes except for taxes "in lieu of which" other taxes were imposed); *id.* at 54 (referring to higher franchise tax rate "'in lieu of' several taxes" to which banks were then not subject); *id.* at 58 (automatic provision should exclude taxes for which the state had substituted another tax); S. Rep. No. 91-530, 91st Cong., 1st Sess. 7-8, *reprinted in* [1969] U.S. Code Cong. & Ad. News at 1600 (new tax should not be automatically imposed by state which imposed an increased rate of tax "in lieu of such new tax") (individual views of Mr. Tower). *But see* Hearings at 51 (suggesting that American Bankers Association proposal would prohibit levying new tax if an "in lieu" tax is imposed) (statement by New York Superintendent of Banks on behalf of National Institute of Supervisors of Banks).

An examination of the state taxing structure would be necessary to determine whether a given tax was already compensated for by another state tax. This seems to have been the understanding of Senator Proxmire, the Senate floor manager of the bill. Asked by another senator if § 3(b) would permit the automatic imposition of sales tax

and certain other taxes and under what circumstances, Senator Proxmire replied:

> The Senator is correct in his understanding.
>
> . . . .
>
> I am unable to describe the precise effect this act will have on the mechanism of the tax laws of each State. Those laws are extremely complex, and require experts on the law of each State to determine what action, if any, will be required by each State in order to take advantage of the act.

115 Cong. Rec. 38633-34.

We conclude from all this that Congress did intend, as the most natural reading of the face of the statute implies, that state law be considered to determine whether another tax or built-up rate was in fact imposed in lieu of the particular tax sought to be imposed automatically under § 3(b).

B. *California's Bank Franchise Tax*

We now turn to the question whether the built-up rate of California's franchise tax on banks was in fact imposed in lieu of the sales tax on sales to national banks.

There can be no serious dispute on this point because it is apparent that during the bridge period sales tax on sales to banks was imposed *in addition* to the built-up rate of the franchise tax. Thus, the franchise tax could not have been intended by the California legislature to be in lieu of the sales tax. Moreover, the method used to compute the built-up rate of the franchise tax applied to banks could not have taken into account the sales tax on sales to banks. As already mentioned, this built-up rate was based on the

ratio between personal property taxes paid by other corporations (but not by banks) and the net incomes of those corporations. *Security-First National Bank v. Franchise Tax Board,* 55 Cal.2d 407, 359 P.2d 625, 628, *cert. denied,* 368 U.S. 3 (1961). Because the sales tax on sales to banks was actually being collected during this period, there was no need to compensate for it in the built-up rate, and there was no place for this sales tax in the formula used to compute the rate.

Beginning with *Western Lithographic Co. v. State Board of Equalization,* 11 Cal.2d 156, 78 P.2d 731 (1938), and throughout the bridge period, the California courts consistently held the incidence of the state sales tax to be on the seller. *See Diamond National,* 425 U.S. at 268 (Stevens, J., dissenting). And even though *Diamond National* overruled this construction for federal purposes, the California courts continue to follow *Western Lithographic* for state law purposes. *See Xerox Corp. v. County of Orange,* 66 Cal.App.3d 746, 136 Cal.Rptr. 583, 589-90 (1977).[4]

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[4]Crocker's argument that *Western Lithographic* was wrongly decided misses the point of our inquiry in this case. Whether or not we would agree with *Western Lithographic,* there is no question that it represented the law of California during the bridge period.

Similarly misplaced is Crocker's suggestion that California should have changed the construction of its sales tax law after the Supreme Court's decisions in *First Agricultural National Bank* (holding the incidence of Massachusetts' sales tax to be on the buyer) in 1968, and *Dickinson* (same re Florida's sales tax) in 1969. As Justice Stevens noted in his dissent in *Diamond National,* California's sales tax was different from the Massachusetts tax, and the California courts continued to hold, both in federal immunity cases and in cases involving purely state law, that the California sales tax was

Thus, there is no doubt that during the bridge period California's bank franchise tax was not actually imposed in lieu of the sales tax on sales to national banks. Hence, automatic imposition of the sales tax under § 3(b) cannot possibly result in unintended double taxation of national banks—the evil which Congress designed § 3 to avoid.

III. *CONCLUSION*

In conclusion, we hold that it was proper for the district court to consider state law in applying § 3(b) of Pub. L. No. 91-156. We also hold that the built-up rate of the California franchise tax on national banks was not imposed in lieu of the sales tax on sales of tangible personal property to national banks. The judgment of the district court in favor of the Board is

AFFIRMED.

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on the seller. 425 U.S. at 269-70. We are not concerned here with the propriety of California's construction of its sales tax law. We need ask only what the structure of the state tax law was during the bridge period.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-77-0786-CBR

UNITED STATES OF AMERICA; and CROCKER NATIONAL BANK, a national banking association,

Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California, an agent of the Cities, Cities and Counties, and Counties of California, an agent of the San Francisco Bay Area Rapid Transit District, and an agent of the Southern California Rapid Transit District,

Defendant.

[Filed May 4, 1978]

MEMORANDUM OF OPINION

The issue in this case is whether the 1969 temporary amendment to § 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548, permitted California to impose its state and local sales taxes on sales of tangible personal property to national banks between December 24, 1969, and

December 31, 1972.[1] Plaintiffs seek a declaration that these taxes were illegally imposed and that appropriate refunds should be granted to all national banks in California, as well as an order granting plaintiff Crocker National Bank ("Crocker") a refund in an amount to be determined in subsequent proceedings. Defendant opposes this prayer and asks for a declaration to the opposite effect. Each side agrees, and the Court finds, that there is no issue as to any material fact, and that judgment may be granted as a matter of law. Accordingly, cross-motions for summary judgment were filed, and arguments on the motions were heard on December 15, 1977. For the reasons set forth below, defendant's motion will be granted.

As an initial matter, defendant's argument that the action is barred by the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, must be rejected. If the suit were brought by Crocker alone, these provisions would be more pertinent. But the law is clear that the Eleventh Amendment is no bar to suit by the United States against a state, even when monetary relief is sought on behalf of a private party who is joined as a plaintiff. *Dept. of Employment v. United States,* 385 U.S. 355, 358 (1966); *see Monaco v. Mississippi,* 292 U.S. 313, 328-329 (1934). It is equally clear

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[1]In the complaint and in their proposed form of order, plaintiffs phrase the issue more generally, referring to all state and local sales and use taxes imposed on national banks during that period. Neither the complaint nor any other document on file with the Court names any specific tax, other than those described in the text, as being improperly imposed. Defendant has affirmatively stated, without contradiction, that the only issue in the case concerns the sales tax on sales to national banks, and this order is accordingly limited to that question.

that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. *Dept. of Employment v. United States, supra,* 385 U.S. at 358. Whether or not the time-honored constitutional tax immunity of national banks as federal instrumentalities is still the law today, *see Agricultural Bank v. Tax Comm'n,* 392 U.S. 339, 341 (1968), and whether or not Crocker should avoid the bar of § 1341 in its own right, *compare United States v. State Tax Commission,* 481 F.2d 963, 974-975 (1 Cir. 1973), *with Federal Reserve Bk. of Boston v. Commissioner of C. & T.,* 499 F.2d 60 (1 Cir. 1974), there is no doubt that it is properly joined as plaintiff with the United States when both assert the same claims. *United States v. State Tax Commission, supra,* 481 F.2d at 975 & n.14; *United States v. Arlington County, Commonwealth of Virginia,* 326 F.2d 929, 932-933 (4 Cir. 1964). *See also Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 474 n.13 (1976).

I. *FACTUAL BACKGROUND*

Resolution of the merits is purely a matter of statutory construction, and the relevant factual background consists of the legal structure of state and local taxation of national banks. In 1819, the United States Supreme Court held national banks constitutionally immune from state taxation. *McCulloch v. Maryland,* 17 U.S. 315, 4 Wheat. 316 (1819). Statutes waiving that immunity have, however, permitted some form of state taxation since 1864. Act of June 3, 1864, c.106, § 41, 13 Stat. 111-112. Whether or not that constitutional immunity is applicable in the present state of the banking industry, it remains the law that states may tax

national banks only as specifically permitted by Congress. *Agricultural Bank v. Tax Comm'n, supra,* 392 U.S. at 341-346. The statute enumerating permissible forms of taxation, originally enacted in 1864, was amended and reenacted as § 5219 of the Revised Statutes of the United States in 1868, and ultimately codified at 12 U.S.C. § 548. Real property owned by banks was subject to taxation from the outset. After the amendments of 1868, 1923, and 1926, the statute provided for four other methods: (1) a tax on shares of capital stock, (2) inclusion of dividends in the taxable income of shareholders, (3) taxation of the banks' net income, or (4) a tax measured by the banks' net income. *See* 12 U.S.C.A. § 548 (1957) (amended 1969) (hereinafter cited as "former § 5219"). With minor exceptions, the states were barred from adopting more than one of the permissible methods. 12 U.S.C.A. § 548(1)(a), *supra.*

In 1928, California adopted a constitutional amendment opting for the fourth, or franchise tax method, which was made generally applicable to all banks. Cal.Const. art. 13, § 16 (current version at Cal.Const. art. 13, § 27 (West Supp. 1978)). In 1929, the legislature imposed and set the rate for the newly authorized tax in accordance with the limits set forth in 12 U.S.C.A. § 548(c), *supra,* Stats. 1929, c. 13, p. 19 (current version at Cal. Rev. & Tax. Code §§ 23181, 23182, 23186 (West. Supp. 1978)). Both the constitution and the statute provided that the franchise tax was "in lieu of all other taxes and licenses, state, county and municipal, imposed upon [the] banks", with the exception of real property taxes. Cal.Const. art. 13, § 16, *supra,* Cal. Rev. & Tax. Code § 23182, *supra.* Banks were thus plainly immune from the sales tax enacted in 1933. But in 1938, the

California Supreme Court ruled that the incidence of the tax was on the retailer, and that sales tax could accordingly be collected from sellers upon their sales of goods to national banks. *Western Lithograph Co. v. State Board of Equal.*, 11 Cal.2d 156, 78 P.2d 731 (1938). Under this theory, national banks were immune from tax on sales made by them as retailers. They were, however, obliged to collect use taxes from consumers of those goods and to pay the amounts collected to the state. Cal. State Board of Equalization, Reg. 1567 (1969) (current version at Cal.Adm.Code T. 18 § 1567 (1976)). *See United States v. Boyd,* 378 U.S. 39, 43 (1964); *Bank of America Nat. Trust & S. Ass'n v. State Bd. of Eq.,* 209 Cal.App.2d 780, 26 Cal.Rptr. 348, 359-362 (1963).

Two decisions of the United States Supreme Court in the late 1960's generated dissatisfaction with this complex system of taxation and led to a major revision of § 5219. In *Agricultural Bank v. Tax Comm'n, supra,* the Court held that the incidence of the newly enacted Massachusetts sales tax was on the purchaser for purposes of federal immunity, and that sales tax was accordingly impermissible on sales of tangible personal property to national banks. 392 U.S. 339. Shortly thereafter, the Court summarily affirmed a three-judge court decision enjoining Florida from collecting sales and use taxes on sales to national banks, intangible personal property taxes on mortgages held by those banks, and documentary stamp taxes on documents held by those banks. *Dickinson v. First National Bank of Homestead, Fla.,* 393 U.S. 409 (1969), *affirming* 291 F.Supp. 855 (N.D. Fla. 1968). These holdings, involving taxes which were commonly imposed in 1969 but for the most part unknown

in 1926, led to the enactment of Pub.L. No. 91-156, 83 Stat. 434 (1969) (hereinafter cited as Pub.L.No. 91-156). Congress thereby amended § 5219 to permit the states to treat national banks as state banks for purposes of taxation, effective January 1, 1972. § 2. The effective date was later extended to January 1, 1973. Act of December 22, 1971, § 4, Pub.L.No. 92-213, 85 Stat. 775. Between December 24, 1969, when the bill was signed into law, and December 31, 1972, a temporary amendment permitted the imposition of certain designated additional taxes including sales and use taxes on both domestic and out-of-state banks. § 1. Imposition of taxes in the interim period was, however, restricted by a saving provision, which reads as follows:

> "(a) Except as provided in subsection (b) of this section, prior to January 1, 1973 [amended by the Act of Dec. 22, 1971, *supra,* to read January 1, 1973], no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless
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> "(1) the tax was imposed on that class of banks prior to the enactment of this Act, or
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> "(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.
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> "(b) The prohibition of subsection (a) of this section does not apply to
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> "(1) any sales tax or use tax complementary thereto,
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> imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Pub.L. No. 91-156, § 3.

In 1969, it appears to have been the view of the California legislature that none of this was relevant to the sales tax on sales to banks, since that tax was not a tax on the banks at all. Although several bills proposing a major overhaul of California bank tax laws were introduced between December 24, 1969, and January 1, 1973, none was enacted.[2] Nor was there any substantive change in the method of calculating the rate of the franchise tax pursuant to Cal. Rev. & Tax. Code § 23186. The state's understanding is reflected in a 1970 letter from defendant's assistant tax counsel stating that "[u]ntil [the] Legislature acts, federal law (P.L. 91-156) . . . will not affect Calif. taxes." Cal. Taxes (P-H) ¶ 21,148.20 (1970).

On the other hand, the cases that provided the impetus for congressional action might also have suggested that the California sales tax on sales to banks could go the way of the Massachusetts and Florida taxes. If the tax were thus invalidated, its effectiveness after 1969 would of course depend on the application of Pub.L.No. 91-156, and possibly on legislative action. But the California tax differed from those of Massachusetts and Florida, and the question of its incidence was regarded as settled by 30 years of authority consistently and unambiguously holding that the incidence

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[2]Changes not relevant to this action were made in §§ 23181, 23182, and 23186 of the Revenue and Taxation Code in 1971, 1972, 1973, 1975, and 1977. In 1974, article 13, § 16, of the constitution was renumbered and amended to permit taxation of banks by any method permitted under federal law, if the legislature so provided by a two-thirds vote. The two-thirds requirement was reduced to a majority in 1976. Until the legislature acts, however, the tax is to be as provided in original § 16. Cal.Const. art. 13, § 27 (West Supp. 1978).

of the sales tax was on the retailer, both in cases involving federal immunity and in cases of purely state law. *See Diamond National v. State Equalization Bd.*, 425 U.S. 268, 269-270 (1976) (Stevens, J., dissenting).

It was not until 1976 that the problem surfaced. In that year, the United States Supreme Court summarily reversed a California decision which had rejected a claim for refund of sales tax on sales to national banks for the year 1968. *Diamond National v. State Equalization Bd., supra,* 425 U.S. 268. Citing *Agricultural Bank v. Tax Comm'n, supra,* 392 U.S. 339, the seven-justice majority simply stated that the incidence of the tax fell on the bank as purchaser. In response, California refunded the sales tax paid on sales to national banks before December 24, 1969. The permanent amendment to § 5219 authorized the tax imposed on sales made after December 31, 1972. And the temporary amendment would clearly authorize the imposition of tax in the interim period, provided the saving provision did not apply. On the theory that the California tax is a sales tax automatically applicable under § 3(b)(1) of Pub.L.No. 91-156, defendant has refused to make any refunds for purchases made after December 23, 1969. In this suit, plaintiffs challenge that action on the ground that California imposes an increased rate of tax in lieu of the sales tax. Thus, in plaintiffs' view, subsection (b) of the saving provision does not apply, and the bar of subsection (a) prevents imposition of the tax until January 1, 1973.

II. *INTERPRETATION OF PUB.L.NO. 91-156, § 3*

Defendant concedes that no affirmative legislative action authorizing the sales tax has been taken, and that the tax,

although unconstitutionally collected, was not "imposed" within the meaning of subsection (a)(1) prior to 1969. There is no dispute that between 1969 and 1973, banks in California paid franchise tax at a built-up rate consisting of the rate applicable to non-financial corporations (7 or 7.6%) plus an additional amount (roughly 4%) determined, with minor adjustments, by the ratio the personal property taxes paid by non-financial corporations bore to their net income in the preceding year. Cal.Rev. & Tax.Code § 23186 (West 1954) (amended 1971, 1972, 1973, 1977). The sole issue is whether that increased rate of tax was imposed "in lieu" of sales tax on sales to banks within the meaning of § 3(b) of Pub.L.No. 91-156.

A. *Narrowing the Issue*

Plaintiffs' initial argument rests on a syllogism. According to the California Constitution and the Revenue and Taxation Code as they read in 1969, the franchise tax was imposed in lieu of all other taxes on banks except taxes on real property. Cal.Const. art. 13, § 16 (West 1954) (current version at art. 13, § 27 (West Supp. 1978); Cal.Rev. & Tax. Code § 23182 (West 1954) (amended 1975). The sales tax on sales to banks is a tax on banks. Therefore, the franchise tax must be in lieu of sales tax on sales to banks. Unfortunately, the law is not so clear. Plaintiffs' contention that the plain meaning rule bars interpretation of statutory language that appears unambiguous on superficial examination is in accord with neither federal nor state law. *Train v. Colorado Pub. Int. Research Group,* 426 U.S. 1, 9-10 (1976); *Doyon, Ltd. v. Bristol Bay Native Corp.,* Nos. 76-3658 *et al.,* slip. op. 365, 368-369 (9 Cir. Feb. 3, 1978); *County of Sac-*

ramento v. Hickman, 66 Cal.2d 841, 428 P.2d 593, 59 Cal. Rptr. 609, 614 n.6 (1967); *Golden v. City of Oakland,* 49 Cal.App.3d 284, 122 Cal.Rptr. 400, 401-402 (1975). Moreover, it would be a very superficial examination indeed that failed to note the latent ambiguity arising from uncertainty as to the incidence of a sales tax. Assuming a uniform test of incidence, the sales tax can be a tax on banks in their capacity as purchasers or in their capacity as retailers, but not both. If the incidence is on the purchaser, the franchise tax is in lieu of the sales tax on sales to banks. If on the retailer, it is in lieu of the sales tax on sales by banks. *See F.R.B. of Boston v. Commissioner of C. & T. of Mass.,* 520 F.2d 221, 223 (1 Cir. 1975). Both cannot be true, and the choice between the two alternative constructions can only be made by reference to evidence other than the "plain language" of the statutes.

For the purpose of determining whether a tax affects a federally immune institution, the test for incidence must be a federal one. *Agricultural Bank v. Tax Comm'n, supra,* 392 U.S. at 347. Since it is now clear that the incidence of the California sales tax is on the purchaser as a matter of federal law, *Diamond National v. State Equalization Bd., supra,* 425 U.S. 268, California consumers could have been taxed on sales made by banks even before 1969. The sales tax newly authorized by Pub.L.No. 91-156, § 1, must thus have been the tax on sales to banks. The language in subsection (a) of the saving provision delaying imposition of the newly authorized taxes until January 1, 1973, must also have reference to sales tax on sales to banks, and the sales tax exempted from the delay by subsection (b) can only be the sales tax on sales to banks. Of course, this sales tax is

exempted from the delay provision of § 3(a) only if the state imposes no tax "in lieu thereof." The construction of this phrase is also a matter of federal law. However, the uniform application of a federal test of incidence does not, as plaintiffs suggest, provide the answer.

Plaintiffs contend that subsection (b) bars the automatic imposition of any new taxes in a state which has an "in lieu" tax of the type authorized by § 5219 prior to 1969. Such an interpretation would seem to deprive the word "thereof" of its significance. If this were the intent of Congress, the last phrase of subsection (b) would more appropriately read "imposed by a State which does not impose an 'in lieu' tax on banks." Thus, Congress' choice of language implies that a closer inquiry into the in lieu tax is required, in order to determine whether it is actually imposed in lieu of the particular tax sought to be imposed automatically pursuant to subsection (b).

The legislative history of Pub.L.No. 91-156 reinforces this conclusion. A major concern in Congress was that a bill eliminating all restrictions on taxation of national banks would subject the banks to double taxation in states that had enacted built-up rates of tax to equalize the tax burden between national banks and state banks or between banks generally and non-financial corporations. Hearings on S. 2065, S. 2096, and H.R. 7491 before the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. 33, 35, 38-41, 43, 60-61 (1969); S.Rep.No. 91-530, 91st Cong., 1st Sess. 1969 U.S. Code Cong. & Adm.News 1594, 1599; *id.* at 1600, 1601 (individual views of Mr. Tower). The saving provision was added to avoid this result, while at the same time "very

firmly committing to the several States responsibility for their own tax policies." Conf. Rep. No. 91-728, 1969 U.S. Code Cong. & Adm.News 1601, 1602-1603.[3] Thus, although the states were free to select a congenial scheme for bank taxation, the saving provision was inserted to ensure that banks would not be the victims of accidental discrimination caused by the automatic imposition of new taxes that had already, in effect, been paid as part of a built-up tax. This policy would of course apply only to those specific new taxes that were in fact compensated for in the built-up rate. Most of the references to "in lieu taxation" in the legislative history reflect that understanding.[4] Accordingly, more than the

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[3]This purpose was further described in a later report on a study by the Board of Governors of the Federal Reserve System undertaken pursuant to Pub.L.No. 91-156, § 4:

"Under the 1969 amendment, certain of the newly authorized taxes * * * could be applied to national banks more or less automatically prior to January 1, 1972. Others under certain circumstances required affirmative action by the State legislature to extend them to national banks. This requirement was designed to prevent undue burdens which might result if additional taxes previously applicable to other businesses were now applied automatically to national banks while all previous taxes on national banks continued without change. As indicated earlier, some States had imposed higher tax rates or made other adjustments in taxes on national banks or all banks, in an effort to equalize taxes among banks or between banks and other businesses. Affirmative legislative action was considered desirable to avoid impairing whatever equality had been achieved by these earlier adjustments." Staff of Senate Comm. on Banking, Housing, and Urban Affairs, 92d Cong., 2d Sess., State and Local Taxation of Banks 13 (1972).

[4]*See* Hearings, *supra*, at 41 (taxes "in lieu of personal property and sales taxes"), 43 (American Bankers Association proposal would permit any tax except, *inter alia*, taxes "in lieu of which" other taxes had been imposed), 54 (higher franchise tax rate " 'in lieu of' several taxes" to which banks are not subject), 58 (bill

mere existence of a built-up bank franchise tax rate is necessary to defeat automatic imposition of the sales tax pursuant to subsection (b). The issue is rather whether that tax was imposed in lieu of the sales tax on sales to banks, in particular.

B. *The Impact of State Law*

The meaning of "in lieu thereof" in subsection (b) is a question of federal law, and the mere fact that a state fails to include a specific tax within the category of taxes in lieu of which a built-up rate is imposed is not necessarily conclusive. On the other hand, state law to the effect that a franchise tax is imposed in lieu of the specific tax in question for purposes analogous to those of the saving provision would powerfully support the same result for federal law. That is not, however, the case here. California law has always held, and even after *Diamond National v. State Equalization Bd., supra,* continues to hold, that the incidence of the sales tax is on the retailer for state law purposes. *See* p. 6, *supra; Xerox Corp. v. County of Orange,* 66 Cal.App. 3d 746, 136 Cal.Rptr. 583, 589-590 (1977). Thus, purchaser banks have no claim to the state in lieu tax exemption on sales made to them. *Western St. Bankcard v. City & Cty.,*

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should exclude taxes for which the state has substituted another tax); S.Rep. No. 91-530, *supra,* 1969 U.S. Code Cong. & Adm.News at 1600 (new tax should not be imposed by a state which imposes an increased rate of tax "in lieu of such new tax") (individual views of Mr. Tower). *Contra,* Hearings, supra, at 51 (American Bankers Association proposal provides that if an in lieu tax is imposed, other taxes may not be levied) (statement of New York Superintendent of Banks on behalf of National Institute of Supervisors of Banks).

San Fran., 19 Cal.3d 208, 561 P.2d 273, 137 Cal.Rptr. 183, 189 (1977).[5]

Plaintiffs' argument that state law has been changed in the wake of *Diamond National v. State Equalization Bd., supra,* 425 U.S. 168 simply ignores this recent authority.[6] Moreover, plaintiffs' logic fails to consider the effect of Pub.L.No. 91-156 on the relationship between state and federal law. California has certainly always attempted to conform its taxation of national banks to § 5219. In all probability, the state would have included the sales tax on sales to banks among the taxes in lieu of which the franchise tax was imposed if former § 5219 had still been the law when *Diamond National* was decided. But California in fact did not so include sales tax on sales to banks prior to *Diamond National*, and after *Diamond National*, the permanent amendment to § 5219 was already in effect. Under the broad authority of that statute, the sales tax was impermissible without regard to its incidence, and there was no reason for California to revise the state law of incidence or of in lieu taxation to conform to former § 5219.

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[5]*Thomas v. Department of Motor Vehicles*, 59 Cal.App.3d 734, 131 Cal.Rptr. 164, 170 (1976), is not to the contrary. The Court of Appeal held there that California motor vehicle taxes could not be imposed under § 3(b) of Pub.L.No.91-156, because the bank franchise tax was imposed in lieu thereof. The motor vehicle tax, unlike the sales tax on sales to banks, was unquestionably a tax on the banks themselves.

[6]Since counsel for plaintiffs represented respondent in the *Western St. Bankcard* case, the failure even to discuss this authority is surprising. While apparently not a breach of the Code of Ethics, ABA Code of Professional Responsibility EC 7-23 (1976), it certainly does not give the Court the benefit of the considered judgment of plaintiffs why this authority is inapplicable.

C. *Federal Law*

What remains to be determined is whether federal law calls for a different result than that reached by the state. After careful consideration of the language and policy of the saving provision as applied to California's scheme for taxation of banks, the Court concludes that Congress did not intend to bar the automatic imposition of sales tax in the circumstances presented here.

The legislative history is clear that the saving provision was designed to prevent unintended double taxation of banks in states that had attempted to equalize the tax burden by means of in lieu taxation.[7] Where such taxes existed,

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[7]Much has been made of the fact that a representative of the American Bankers Association, while testifying before the Senate Committee on Banking and Currency, referred to California as a state in which there was an "increased tax rate for banks based on income in lieu of personal property and sales taxes * * *." Hearings, *supra*, at 41. Similar mileage could be made of a later statement, annexed to the report on a study made by the Board of Governors of the Federal Reserve System, to the effect that it was expected that the franchise tax rate in Massachusetts and California would "be reduced administratively in recognition of the new additional taxes" authorized by Pub.L. No. 91-156, "such as sales and use taxes." Leland, "The History and Impact of Section 5219 on the Taxation of National Banks," Appendix 6 to State and Local Taxation of Banks, *supra*, note 3. Plaintiffs would interpret these statements to mean that Congress had California specifically in mind as a state where franchise tax was imposed in lieu of sales tax on sales to banks. Defendant counters that the statements can have reference only to sales taxes on sales by banks, since it would be ridiculous to state that a franchise tax was imposed in lieu of a tax that was in fact being collected at the time the statements were made. Plaintiffs respond that it would be ridiculous to specifically mention the sales tax on sales by banks, which involved miniscule amounts of revenue and was in any case recouped by compensa-

affirmative legislative action was considered desirable "to avoid impairing whatever equality had been achieved by those earlier adjustments." State & Local Taxation of Banks, *supra*, note 3, at 13; *See also* S.Rep.No. 91-530, *supra*, 1969 U.S. Code Cong. & Adm.News at 1599. To bar automatic imposition of the sales tax here would in fact achieve precisely the opposite result: it would impair whatever equality had been achieved by disrupting the scheme consciously adopted by the California legislature with the goal of equalizing the tax burdens of banks and non-financial corporations within the limits of federal law.

The imposition of sales tax on sales to banks in addition to the built-up franchise tax was plainly a tax policy deliberately adopted by the California legislature. Sales tax on sales to banks was not, of course, a component in the formula for calculating the bank franchise tax rate. *See* p. 7, *supra*. This is the predictable result of a formula designed to comply with former § 5219's requirement that the tax burden imposed on national banks be no greater than the burden imposed on non-financial corporations. 12 U.S.C.A. § 548(c) (1957) (amended 1969); *Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 472-475 (1961). The relevant taxes for inclusion in the formula were thus those paid by non-financial corporations but not by banks. Since the incidence of the sales tax was believed to be on the retailer prior to 1976, sales tax was being collected on sales to banks, as well

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tory use taxes imposed on consumers. Both parties are correct. The Court can only conclude that the statements, which make little sense on either interpretation contended for, reflect a superficial understanding of California law and should be given no weight in determining the intent of Congress.

as on sales to non-financial corporations. This burden, imposed equally on banks and non-financial corporations in proportion to their purchases, simply had no place in the formulation of an in lieu tax rate to equalize tax burdens.

We must assume, however, that the legislature was aware that the sales tax was being paid on sales to banks. Had the legislature known that the tax was in fact a tax on the purchaser under federal law, and that national banks were accordingly immune from tax on sales to them, the resulting inequality in tax burdens would have been a factor for consideration in setting the franchise tax rate. The appropriate response might well have been to incorporate the federal rule of incidence into California law. The franchise tax would then have been imposed in lieu of the sales tax on sales to banks, and the rate could have been adjusted upward to reflect the proportion such sales taxes bore to the net income of non-financial corporations. Such an upward adjustment would have been entirely proper, since neither the federal nor the state law governing taxation of national banks was designed to relieve banks from their fair share of the tax burden or to promote banking as an institution. Federal law merely governs the form in which taxes can be imposed in order to prevent discrimination against banks, and California adopted the prescribed forms in order to tax national banks at all. *Tradesmen's Bank v. Tax Comm'n,* 309 U.S. 560, 567-568 (1940); *Western St. Bankcard v. City & Cty., San Fran., supra,* 137 Cal.Rptr. at 187; *Security-First National Bank v. Franchise Tax Bd.,* 55 Cal.2d 407, 359 P.2d 625, 11 Cal.Rptr. 289, 292-293, *appeal dismissed,* 368 U.S. 3 (1961). California's method of calculating the in lieu rate was upheld over the banks' protest

that the method led to higher taxes than would have resulted from direct imposition of personal property taxes. *Security-First National Bank v. Franchise Tax Bd., supra,* 11 Cal.Rptr. 289. The tax rate was found to be nondiscriminatory at a time when sales tax on sales to banks was also being imposed. If banks were no longer subjected to that tax, an additional rate increase in lieu thereof would have been authorized by the same reasoning.

Whether the legislature was reasonable in continuing to impose the sales tax on sales to banks after *Agricultural Bank v. Tax Comm'n, supra,* 392 U.S. 339, and whether it would in fact have made the adjustments necessary to equalize tax burdens if it had known that the sales tax on sales to banks was unconstitutional, are questions of no import under Pub.L.No. 91-156. What is absolutely clear is that the California legislature intended to impose both a built-up franchise tax and a sales tax on sales to banks, and that the built-up rate accordingly was not formulated, as it could properly have been, to compensate for the sales tax on sales to banks. Thus, there is no possibility whatever that the automatic imposition of sales tax pursuant to § 3(b) of Pub.L.No. 91-156 could have resulted in either unintended or double taxation. Invalidation of the tax for the years 1969 to 1973 would result in a plainly unintended windfall to banks in violation of the announced congressional policies of maintaining the equality achieved by state tax laws before 1969 and committing the responsibility for their own tax policies to the states.

Faced with these facts, plaintiffs cannot simply rely on the argument that Congress wanted the states to re-examine

their tax structures and to take affirmative action if new taxes were to be imposed before 1973. That was clearly one of Congress' concerns. But it is equally clear that § 3(b) created an exception to that policy. The states were not required to undertake the meaningless, technical exercise of reenacting the common, non-discriminatory taxes enumerated in that subsection in order to make them applicable to national banks—provided only that the newly applicable taxes did not create an unintended double tax when added to existing built-up taxes. In California, where the sales tax on sales to banks had been collected for decades, it could be said with certainty that the imposition of that tax was neither unintentional nor duplicative. The banks had already had their day, both in the legislature and in court, to argue that the franchise tax rate was too high in light of the other tax burdens they bore, including the burden of sales tax reimbursement. The later shifting of the legal incidence of the sales tax did nothing to change those burdens, and added nothing to the banks' argument that their total tax burden was unfairly high. It would indeed be an exaltation of form over substance to hold that the legislature should have reenacted the sales tax in 1969 in order to make it applicable to transactions—sales to banks —to which it was and had always been assumed it applied and on which it was being and had always been collected. Congress did not intend to require any such formalistic result.

Accordingly, California did not, between 1969 and 1973, impose any tax in lieu of the sales tax on sales to banks within the meaning of Pub.L.No. 91-156, § 3(b). Since that tax was exempted by § 3(b) from the delay provision of

§ 3(a), it was legally imposed between December 24, 1969, and December 31, 1972, and no refunds can be granted.

III. *ORDER*

For the reasons set forth above, IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

IT IS HEREBY FURTHER ORDERED that counsel for defendant shall prepare an appropriate form of judgment, obtain the approval of counsel for plaintiffs as to form, and submit it to the Court for execution within ten (10) days of the date of this order.

Dated: May 2, 1978.

/s/ CHARLES B. RENFREW
Charles B. Renfrew
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-77-0786-CBR

UNITED STATES OF AMERICA; and CROCKER NATIONAL BANK, a national banking association,

Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California, an agent of the Cities, Cities and Counties, and Counties of California, an agent of the San Francisco Bay Area Rapid Transit District, and an agent of the Southern California Rapid Transit District,

Defendant.

[Filed May 22, 1978]

ORDER AND JUDGMENT

This cause came on to be heard before the Court, Honorable Charles B. Renfrew, United States District Judge, presiding, on motion of the plaintiffs United States of America and Crocker Bank for summary judgment and on cross-motion of the defendant State Board of Equalization for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having heard the argument of counsel, and due deliberation having been had thereon, it is

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied, and it is further

ORDERED that the defendant's cross-motion for summary judgment be and the same hereby is granted, and it is further

ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs' prayer for relief herein is not barred by the Eleventh Amendment nor the Tax Injunction Act (28 U.S.C. § 1341);

2. That California did not, during the period from December 24, 1969, through December 31, 1972, impose any tax in lieu of the sales tax on sales to national banks within the meaning of Public Law No. 91-156, section 3(b), and that said sales tax on sales to national banks was therefore legally imposed during said period;

3. That defendant has judgment against plaintiffs and that defendant recover its costs of action.

Dated at San Francisco, California this 22nd day of May, 1978.

(s) Charles B. Renfrew
United States District Judge

Approved as to form:

By /s/ John M. Youngquist,
AUSA
Attorneys for Plaintiff
United States of America

Franklin C. Latcham,
Prentiss Willson, Jr.,
Morrison & Foerster

By /s/ Franklin C. Latcham,
Attorneys for Plaintiff
Crocker National Bank

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 78-2899
DC CV 77-0786 CBR

UNITED STATES OF AMERICA, and
CROCKER NATIONAL BANK, etc.,
Plaintiffs-Appellants,

vs.

STATE BOARD OF EQUALIZATION,
an agency of the State of California, etc.,
Defendant-Appellee.

Judgment

[Filed and Entered Oct. 23, 1980]

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 23, 1980

Appendix D

Act of December 24, 1969,
P.L. No. 91-156, 83 Stat. 434.

§ 1 Temporary amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdiction on a non-discriminatory basis:

"(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

"(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

"(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

"(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

"(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

"(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

"(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

(b) The amendment made by subsection (a) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.

§ 2. Permanent amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended to read:

"Sec. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

(b) The amendment made by subsection (a) becomes effective on January 1, 1972 [later amended to "January 1, 1973" by P.L. 93-213].

§ 3. Saving provision

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972 [later amended to "January 1, 1973" by P.L. 93-213], no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto,

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

§ 4. Study by Board of Governors of the Federal Reserve System

(a) The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall make a study to determine the probable impact on the banking systems and other economic effects of the changes in existing law to be made by section 2 of this Act govern-

ing income taxes, intangible property taxes, so-called doing business taxes, and any other similar taxes which are or may be imposed on banks. In conducting the study the Board shall consult with the Secretary of the Treasury and appropriate State banking and taxing authorities.

(b) The Board shall make a report of the results of its study to the Congress not later than December 31, 1970. The report shall include the Board's recommendations as to what additional Federal legislation, if any, may be needed to reconcile the promotion of the economic efficiency of the banking systems of the Nation with the achievement of effectiveness and local autonomy in meeting the fiscal needs of the States and their political subdivisions.

Appendix E

Act of December 22, 1971
P.L. No. 92-213, § 4(a) 85 Stat. 775.

Sec. 4.(a) The Act entitled "An Act to clarify the liability of national banks for certain taxes", approved December 24, 1969 (83 Stat. 434), is amended by striking out "1972" in sections 2(b) and 3(a) and inserting in lieu thereof "1973".

Appendix F

California Revenue and Taxation Code
Section 23181(a), As In Effect for the
Period From December 24, 1969, Through
December 31, 1972.

§ 23181(a) An annual tax is hereby imposed upon every bank located within the limits of this state according to or measured by its net income, upon the basis of its net income for the next preceding income year at the rate provided under Section 23186. With respect to the taxation of national banking associations, the state adopts the method numbered (4) authorized by the act of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, Title 12, Section 548, United States Code.

California Revenue and Taxation Code
Section 23182, As In Effect for the Period
From December 24, 1969 Through
December 31, 1972.

§ 23182. The tax imposed under Section 23181 upon banks is in lieu of all other taxes and licenses, state, county and municipal, upon the said banks except taxes upon their real property.

Appendix G

United States Constitution
Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix H

California Constitution Article XIII,
Section 16, As In Effect During The
Period From December 24, 1969, Through
December 31, 1972.

Sec. 16. 1.(a) Banks, including national banking associations, located within the limits of this State, shall annually pay to the State a tax, at the rate to be provided by law according to or measured by their net income, which shall be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property and, when permitted by the Congress of the United States with respect to national banking associations, motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the State upon vehicles, motor vehicles or the operation thereof.

(b) The Legislature may provide by law for any other form of taxation now or hereafter permitted by the Congress of the United States respecting national banking associations; provided, that such form of taxation shall apply to all banks located within the limits of this State.

2. The Legislature may provide by law for the taxation of corporations, their franchises, or any other franchises, by any method not prohibited by this Constitution or the Constitution or laws of the United States.

3. Any tax imposed pursuant to this section must be under an act passed by not less than two-thirds vote of all the members elected to each of the two houses of the Legislature.

Appendix I

Excerpt from Gurley, The California Bank Tax, California Assembly Interim Committee on Revenue and Taxation, TAXATION OF PROPERTY IN CALIFORNIA, Vol. 4, No. 12, pp. 247, 261-62 (1964).

[I]f personal property taxes cannot be imposed on banks directly, a supplementary tax on their income should be based on *their* personal property holdings and not on those of other corporations. To the extent that other corporations hold larger amounts of personal property than do banks, banks are discriminated against by a supplementary rate based on corporations' personal property.

* * *

[T]he present method of computing the *in lieu* tax rate on banks cannot be defended from an equity standpoint, because it is based on other corporations' personal property and not on that of banks.